*United States Government*
*National Labor Relations Board*
**OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: June 13, 2001

TO: Elizabeth Kinney, Regional Director
Harvey A. Roth, Regional Attorney
Gail Moran, Assistant to Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Terracon Consultants, Inc.
Case 13-CA-39181

177-1617
347-2067
530-2025
530-2075-6700
530-3067-1500
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712-5028-7556-3333
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This Section 8(a)(5) case was submitted for advice as to whether there is sufficient evidence that Terracon Consultants, Inc. ("the Employer") granted voluntary recognition to Operating Engineers Local 150 ("the Union").[1]

## FACTS

The Employer is an engineering firm with offices in more than 20 states. This case involves only the Employer's Naperville, Illinois, facility.

Between February 9 and February 13, 2001,[2] the Union obtained signed authorization cards from all nine of the Employer's Naperville drillers and helpers. At approximately 5:55 a.m. on February 19, Union representatives Simrayh and Edwards went to the Naperville facility. Seven of the card signers, all of whom wore Union hats and buttons, accompanied them.

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[1] In view of our authorization to issue complaint, the Region should submit its recommendation regarding the Union's request for Section 10(j) relief to the Injunction Litigation Branch.

[2] All dates refer to 2001 unless otherwise indicated.

The Naperville Office Manager, Moussallem, met the group. Simrayh introduced himself and Edwards, explained that the Union sought voluntary recognition, and asked that Moussallem meet with the group. Moussallem refused to meet with the employees, but suggested that he, Simrayh and Edwards talk.

In Moussallem's office Simrayh repeated that the Union sought voluntary recognition and offered Moussallem a copy of the signed Union authorization cards. Moussallem accepted the copy, inspected it and said that he could see that all of the Employer's drillers and helpers had signed cards. When Moussallem asked whether the Union wanted to give him anything else, Simrayh handed him a letter demanding recognition[3] as well as a voluntary recognition agreement. Simrayh testified that Moussallem read the agreement but stated that he could not sign it at that time.

Simrayh then asked Moussallem if he would consider talking to the Union concerning employees' wages and working conditions. Moussallem stated that the Employer could not even afford a five-cent an hour wage increase, and that any Union request for a raise would force him to take the "very drastic action" of subcontracting all drilling work and eliminating the drilling division. Edwards asked how Moussallem knew he couldn't afford the Union without first reviewing its wage proposal. Moussallem reiterated that the Employer could not afford any raise and repeated his threat to subcontract.

Moussallem then asked exactly whom the Union sought to represent. Simrayh replied twice that the Union only sought to represent the Employer's drillers and helpers, and pointed to the copy of the signed authorization cards.

Moussallem asked the Union representatives what the employees wanted. Simrayh said they wanted heavier winter coveralls, and asked if Moussallem could provide these. Moussallem replied that he would have no problem providing better coveralls. Simrayh asked Moussallem to increase the employees' boot allowance, and Moussallem said he would recommend that this be done.[4] Simrayh said employees also

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[3] The letter, dated February 19, was addressed to Employer Regional Manager Jefferis. Moussallem and Jefferis are the highest-ranking Employer officials at Naperville.

[4] Moussallem did not specify to whom he would make his recommendation.

wanted more time to maintain their equipment because of safety concerns. Moussallem stated that he had no problem with that because safety was important to him as well. Simrayh next said that employees wanted HazMat training, and Moussallem countered that employees already received such training. Simrayh said that he was asking that all employees receive this training. Mousallem agreed that all employees should receive HazMat training.

Simrayh then discussed other drilling companies which he said benefited from collective-bargaining relationships with the Union. Moussallem asked whether the Union represented professional engineers, and Simrayh replied that the Union did in Cook County.

The meeting, which lasted about 45 minutes, concluded with Simrayh asking Moussallem if they could schedule another meeting to continue discussing the employees' wages and benefits and terms and conditions of employment. Moussallem suggested that Simrayh and Edwards eat breakfast and return to the shop around 7:30 a.m., when Jefferis would be available. The Union asked to see the employees before leaving, but Moussallem refused because they were in a meeting.

Simrayh and Edwards returned at approximately 7:45 a.m. and met with Moussallem, Jefferis and the Employer's head of engineering. Simrayh explained that earlier the Union had requested voluntary Employer recognition as the collective-bargaining representative of the drillers and helpers, and presented Jefferis with the voluntary recognition agreement and a copy of the signed authorization cards. Jefferis read the agreement and set it on his desk without comment. While Jefferis carefully reviewed the copy of the cards, Simrayh asked whether he was aware that the Union had obtained signatures from all of the Naperville drillers and helpers. Jefferis acknowledged this was the case. Simrayh recapped the issues the Union had discussed earlier with Moussallem, which Jefferis characterized as peanuts.

Simrayh then specifically asked about HazMat training, and Jefferis replied that the training was no big deal and was easy. Jefferis responded affirmatively when Edwards asked if he would provide all employees with HazMat training.

Jefferis then asked what the Union could do in regard to employee training. Simrayh gave a detailed explanation of the Union's apprenticeship and skill-improvement program, adding that the Union provided drill-rig training. Jefferis asked whether there was a professional engineer at

the Union's training program, to which Simrayh responded that there was not, but that the Union would absolutely look into it. When Jefferis inquired about the wages the Union would seek, Simrayh replied that the Union would negotiate a fair rate. Jefferis said that it made sense to bring in some employees at the apprentice level. Simrayh concurred, and noted that the Union contract included an apprentice level. [*FOIA Exemptions 6, 7(C) and 7(D)* ] Jefferis agreed that some employees would be classified as apprentices rather than journeymen. Jefferis asked whether the Union provided operators and Simrayh stated that the Employer would have access to the Union's referral list, which included experienced journeymen operators.

Jefferis next asked about employee tardiness. Simrayh explained that all of the Union's contracts contain progressive discipline provisions. Jefferis asked how the Union addressed employee punctuality. Simrayh stated that the Union's contracts guarantee employees a 40-hour workweek, but provide that any employee late for work forfeits the guarantee. Jefferis stated that if he were required to pay Union wages, it would not be feasible to remain in the drilling business. Edwards said the Union considered that a direct threat, to which Jefferis replied that it was not a threat but a promise. Jefferis said that if he had to go Union then the whole country would have to go Union. Simrayh reminded Jefferis that the Union was only interested in the nine Naperville drillers and helpers.

Jefferis said he currently paid $3.55 per employee for insurance and asked what the Union's cost would be. Simrayh said that the Union was in the same range. When Jefferis asked what the Union could do for poor employee morale, Simrayh replied that joining the Union would improve employee morale.

Jefferis ended the meeting by stating that the Employer would contact the Union in the near future. Simrayh stated that the Union wished to continue to meet and negotiate over the issues they had discussed, as well as others.

On February 20, the Union sent a letter to the Employer, by fax and registered mail, summarizing the parties' discussions the previous day. The letter also stated that pursuant to the Employer's request the Union would furnish it with copies of its health and welfare

program.[5] In addition, the letter reminded the Employer that it must maintain the status quo during contract negotiations.

On February 21, Jefferis responded to the Union's letter by thanking the Union for its February 19 "courtesy call." He acknowledged that the parties had discussed several "very minor issues" raised by the Union, but stated that the Employer had not recognized or bargained with the Union. He then asserted that he had informed the Union when they met that neither he nor his staff had authority to recognize or bargain with the Union on the Employer's behalf, but that he had spoken with "upper management," who indicated they would contact the Union the following week "to discuss the above matters."

On February 21, the Employer also filed a representation petition covering the same unit for which the Union sought voluntary recognition.[6] The petition names Jefferis as the Employer Representative.

**ACTION**

We conclude that the Employer granted voluntary recognition to the Union on February 19, and we reject the Employer's contention that Moussallem and Jefferis lacked authority to grant such recognition on the Employer's behalf. Therefore, absent settlement, complaint should issue alleging that the Employer violated Section 8(a)(5) and (1) by withdrawing recognition from, and refusing to bargain with, the Union on February 21.

I. The Employer Voluntarily Recognized the Union.

Whether or not an employer has granted voluntary recognition is a question of fact.[7] Finding an extension of recognition does not require that an employer explicitly state as much, but may be inferred from conduct consistent with a grant of recognition.[8]

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[5] [*FOIA Exemptions 6, 7(C) and 7(D)* ] the Employer had requested this information during their second meeting.

[6] Case 13-RM-1697. The petition is blocked by this charge.

[7] Nantucket Fish Co., 309 NLRB 794, 795 (1992).

[8] See, e.g., Richmond Toyota, Inc., 287 NLRB 130, 132 n.4 (1987).

For example, in Jerr-Dan Corp.[9] the union visited the employer and claimed majority employee support; the employer inspected the union's evidence of majority; and the employer acknowledged the union's majority. The Board held that because it then committed to enter negotiations with the union, the employer had effectively recognized the union's majority.[10] In this regard, the Board quoted from Brown & Connolly, Inc.:[11]

> Once voluntary recognition has been granted to a majority union, the [u]nion becomes the exclusive collective-bargaining representative of the employees, and withdrawal or reneging from the commitment to recognize before a reasonable time for bargaining has elapsed violates the employer's bargaining obligation. Evidence that an employer has commenced bargaining or has taken other affirmative action consistent with its recognition of the [u]nion aids in resolving the evidentiary question as to whether recognition was granted. However, once the fact of recognition is established, such additional evidence is not required, for the bargaining obligation arises upon voluntary recognition and continues until there has been a reasonable opportunity for bargaining to succeed. [Internal citations omitted; emphasis added.]

This statement underscored the Board's finding that the employer's subsequent cancellation of the scheduled bargaining session and withdrawal of recognition violated Section 8(a)(5). 237 NLRB at 303.

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[9] 237 NLRB 302 (1978), enfd. 601 F.2d 575 (3d Cir. 1979) (Table).

[10] 237 NLRB at 303, 306, 308. See also Vincent M. Ippolito, Inc., 313 NLRB 715, 721 (1994), enfd. 54 F.3d 769 (3d Cir. 1995)(Table)(citing Jerr-Dan, voluntary recognition found where employer conceded union majority and ALJ found "not only was a commitment to bargain made...but actual bargaining took place....").

[11] 237 NLRB 271, 275 (1978), enfd. 593 F.2d 1373 (1st Cir. 1979) (after discussing several employment topics, acknowledging union's majority status, and orally recognizing union, employer scheduled bargaining session).

In Nantucket Fish, the Board stated that to interpret the employer's brief response, "fine, we'll meet with you," as an express recognition of the union would have ignored the realities of the situation and imposed a bargaining relationship on the parties in the absence of a "clear, express, and unequivocal statement of recognition." 309 NLRB at 795. The Board deemed the employer's response ambiguous, concluded that other evidence failed to resolve this ambiguity, and noted that the employer neither commented on the union's petition nor acknowledged that the union had presented proof of majority support. Id.

However, the "clear and unequivocal" recognitional language used in Nantucket Fish did not overrule the recognition standards set forth in Jerr-Dan and Brown & Connolly. Thus, the Board acknowledged in Nantucket Fish that

> [a] commitment to enter into negotiations with the union is also an implicit recognition of the union. Once the original commitment to bargain is made, the employer cannot unilaterally withdraw its recognition and to do so is a violation of the Act. 309 NLRB at 795, citing Jerr-Dan, 237 NLRB at 303.[12]

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[12] Other cases applying these principles in determining whether voluntary recognition had been granted include Trevose Family Shoe Store, 235 NLRB 1229, 1229 n.1 (1978) (no voluntary recognition where "no credited objective evidence that the [employer] recognized the [u]nion or committed itself (impliedly or otherwise) to bargain"); Lyon & Ryan Ford, Inc., 246 NLRB 1, 4 (1979), enfd. 647 F.2d 745 (7th Cir. 1981), cert. denied 454 U.S. 894 (1981) (voluntary recognition where prior to employer's withdrawal of recognition and demand for an election, union represented a majority of unit employees and employer's conduct established it recognized union as such; employer checked employees' union authorization and application for membership cards, examined a proposed contract, met with the union on three separate occasions to discuss proposed contract terms, and allowed union representatives to go onto the floor during work hours to meet with unit employees); and Ednor Home Care, Inc., 276 NLRB 392, 394, 395 (1985) (Board affirmed without discussion ALJ's conclusion of no voluntary recognition, because, among other things, facts were "strikingly similar" to Trevose; unlike Jerr-Dan employer never conceded existence of

Based upon the foregoing principles, we agree with the Region that the Employer effectively recognized the Union on February 19. The Union clearly claimed majority status when Simrayh, Edwards and seven unit employees wearing Union hats and buttons arrived at the Employer's facility, announced the purpose of their visit and presented Moussallem with a copy of the signed Union authorization cards, a written demand for recognition and the voluntary recognition agreement. The evidence also reveals that both Employer officials carefully inspected the copy of the signed Union authorization cards. In addition, Moussallem stated that he could see that the cards were signed by all of the Employer's Naperville drillers and helpers, and Jefferis acknowledged (in response to Simrayh) that each unit employee had signed a card. Moreover, the Employer never professed any doubt as to the Union's majority status in its February 21 letter to the Union. Thus, at no time did the Employer ever question the Union's majority status.[13]

Next, the evidence shows that at both meetings the Employer and Union engaged in a substantive dialogue concerning specific terms and conditions of employment raised by the Union. These included providing better winter coveralls, increasing the employees' boot allowance, giving employees more time to maintain their equipment, and providing all employees with HazMat training. In addition, the Employer raised specific issues with the Union concerning terms and conditions of employment, such as job training, wages, employee classifications, provision of operators, employee tardiness, insurance costs, employee morale and the Union's health and welfare program. Although these discussions did not result in an agreement between the parties, we conclude that the parties

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majority support for union; and no negotiations, consciously or unwittingly, had occurred).

[13] Compare Nantucket Fish, 309 NLRB at 794, 795 (Board found employer neither commented on union's petition nor acknowledged that union had presented proof of majority support, noting that employer twice expressed good-faith doubt as to union's majority status); Trevose, 235 NLRB at 1232 (ALJ found employer never acknowledged union's majority status); and Ednor, 276 NLRB at 394 (ALJ found that employer never conceded union's majority status and that union made no claim of majority).

nevertheless negotiated.[14] And, as the Board reiterated in Jerr-Dan, evidence that an employer has commenced bargaining or has taken other action consistent with its recognition of the union aids in resolving the evidentiary question as to whether recognition was granted.[15] The fact that neither Moussallem nor Jefferis executed the voluntary recognition agreement after examining the authorization cards does not render the Employer's conduct ambiguous, since the Employer officials resolved any possible ambiguity regarding voluntary recognition by their subsequent conduct.[16]

The Employer relies on Jefferson Smurfit Corp.[17] in contending that it never waived its right to insist upon an election and acted lawfully when it stated on February 21 that it had neither recognized nor bargained with the Union. Thus, the Employer argues that its representation petition should be processed.

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[14] We find Ednor inapposite in this regard as well because unlike here, the ALJ there found that no negotiations, consciously or unwittingly, had taken place. 276 NLRB at 395. But see Vincent M. Ippolito, 313 NLRB at 321 (actual bargaining occurred), quoted above at n.11.

[15] Jerr-Dan, 237 NLRB at 303, quoting Brown & Connolly, 237 NLRB at 275.

[16] Compare, e.g., Nantucket Fish, where the Board concluded that the employer's response to the union was ambiguous, and that other evidence did not remove this ambiguity, thus precluding a finding of voluntary recognition. 309 NLRB at 795. We also note that at the conclusion of the first meeting, Moussallem denied the Union's request to meet with employees solely because they were in a meeting and therefore unavailable -- he did not in any way base his decision on a lack of representational status based on his refusal to recognize the Union. See Richmond Toyota, 287 NLRB at 131 (employer had recognized union where, among other things, vice president declined to negotiate with union not on general grounds or by questioning union's majority status, but due to a scheduling conflict and because her husband would attend negotiations).

[17] 331 NLRB No. 80 (2000).

We agree with the Region that Jefferson Smurfit is factually distinguishable from the instant case. There, when presented with the union's signed authorization cards and its written demand for recognition, an employer manager examined the letter and made copies of the cards, but contemporaneously told the union he needed to consult with counsel. Later that day the employer refused to recognize the union for the requested unit. 331 NLRB No. 80, slip op. at 1. The Board held that under Linden Lumber,[18] the employer lawfully declined to grant the union recognition based on the union's mere proffer of evidence of majority status. Thus, unlike the instant case, the employer in Jefferson Smurfit undertook no action from which a grant of recognition could reasonably be inferred (e.g., entering into negotiations).

Moreover, Jefferson Smurfit's holding relied on Nantucket Fish where, as discussed above, the Board found no extension of recognition but also reiterated that a commitment to enter negotiations constitutes implicit recognition of a union. Id. Since we have concluded that the parties here did in fact negotiate and scheduled another bargaining session, Jefferson Smurfit is clearly inapplicable here.[19]

In sum, we conclude that the Employer's conduct on February 19 establishes that it implicitly recognized the Union on that date. Therefore, its subsequent withdrawal of recognition and refusal to bargain with the Union was unlawful.

II. Moussallem and Jefferis Possessed Authority to Recognize the Union on the Employer's Behalf.

[18] Linden Limber Division, Sumner & Co. v. NLRB, 419 U.S. 301 (1974) (an employer does not violate Section 8(a)(5) solely by a refusal to accept evidence of majority status proffered by a union by some means other than a Board election).

[19] We also find the Employer's reliance on Stamford Taxi, Inc., 332 NLRB No. 149 (2000), misplaced. That case in no way supports the Employer's contention that voluntary recognition cannot be established absent an express agreement. That case involved a bargaining obligation established pursuant to a written extension of recognition from which the employer attempted to withdraw based on union-condoned unprotected activity prior to reaching a contract.

It is well established that an employer is bound by the acts of those of its officials who are in charge of the day-to-day operations at its facility and possess actual or apparent authority with respect to labor relations matters.[20] In deciding whether an individual possesses apparent authority, the Board considers whether, under all the circumstances, the employees would reasonably believe that the individual's conduct reflected company policy and thus that the individual spoke and acted for management.[21]

Therefore, even assuming that Moussallem and Jefferis lacked actual authority to recognize the Union, we agree with the Region that they possessed at least apparent authority to recognize the Union. Moussallem and Jefferis are the two highest-ranking officials at the Naperville facility, and neither ever claimed to lack authority to recognize the Union.[22] In addition, each of them negotiated with the Union about employees' terms and conditions of employment.

We recognize that Moussallem specifically stated that he would recommend the boot allowance be increased. However, he also indicated that he spoke directly on the Employer's behalf regarding various other matters raised by the Union. For example, Moussallem stated he could not afford to grant a raise and that any Union request for a wage increase would force him to subcontract the drilling work and eliminate the drilling division; he would have no problem providing better coveralls; and he had no problem providing employees more time to maintain their equipment. In addition, Moussallem gave no indication that he lacked authority to recognize or negotiate with the Union by suggesting that Simrayh and Edwards return at 7:30 when Jefferis would be available. Rather, he merely noted that

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[20] See, e.g., Opportunity Homes, Inc. 315 NLRB 1210, 1217 (1994), enfd. 101 F.3d 1515 (6th Cir. 1996), citing Richmond Toyota, 287 NLRB 130 (1987) and Nemacolin Country Club, 291 NLRB 456 (1988), enfd. 879 F.2d 858 (3d Cir. 1989) (Table).

[21] See, e.g., Futuramik Industries, Inc., 279 NLRB 185, 185 (1986), Community Cash Stores, 238 NLRB 265, 265 (1978).

[22] In this regard, the Employer's representation petition designates Jefferis as the Employer Representative. As such, it strains credulity for the Employer to maintain that Jefferis was without authority to recognize the Union.

Jefferis normally arrived for work then and, in our view, it made sense to include him in the negotiations as a practical matter, especially since the letter demanding recognition was addressed to Jefferis. Thus, we conclude that Moussallem possessed at least apparent authority to recognize the Union because, in all the circumstances, the employees and Union officials could reasonably conclude that Moussallem spoke and acted for management.

Even assuming that Moussallem lacked any authority to recognize the Union, we conclude that as the highest-ranking official at Naperville, Jefferis possessed at least apparent authority to act on the Employer's behalf. Thus, he characterized the issues discussed with Moussallem earlier as peanuts,[23] committed the Employer to put all employees through HazMat training, and inquired about a number of topics of interest to management (including, among others, job training, wages, job classifications and insurance costs). Accordingly, we conclude that Jefferis possessed at least apparent authority to recognize the Union because, in all the circumstances, the employees and Union officials could reasonably conclude that Jefferis spoke and acted for management.

III. Conclusion

In sum, we find that the Employer implicitly recognized the Union on February 19 because on that date the Union claimed to represent a majority of unit employees; the Employer inspected the Union's evidence and acknowledged the Union's status as such; and the Employer thereafter entered into negotiations with the Union. We further conclude that Moussallem and Jefferis each possessed at least apparent authority to act on the Employer's behalf in this regard. Therefore, absent settlement, complaint should issue alleging that the Employer violated Section 8(a)(5) and (1) when it withdrew recognition from, and refused to bargain with, the Union on February 21.

B.J.K.

[23] Jefferis thereby arguably ratified Moussallem's earlier statements.